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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85690391
Applicant	Foamation Inc.
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**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Foamation Inc.

Mark:

Serial No.: 85690391

Filed: July 30, 2012



SUPPLEMENTAL APPEAL BRIEF

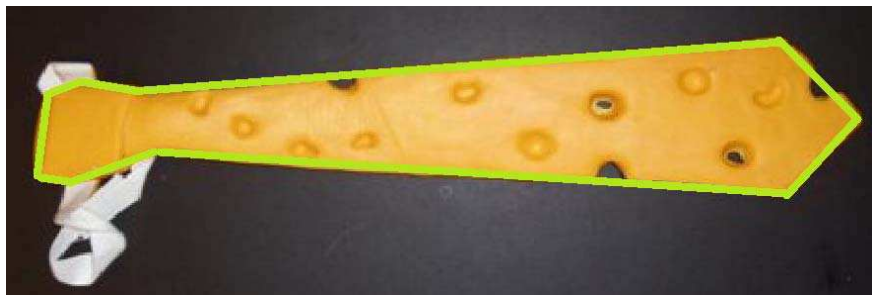
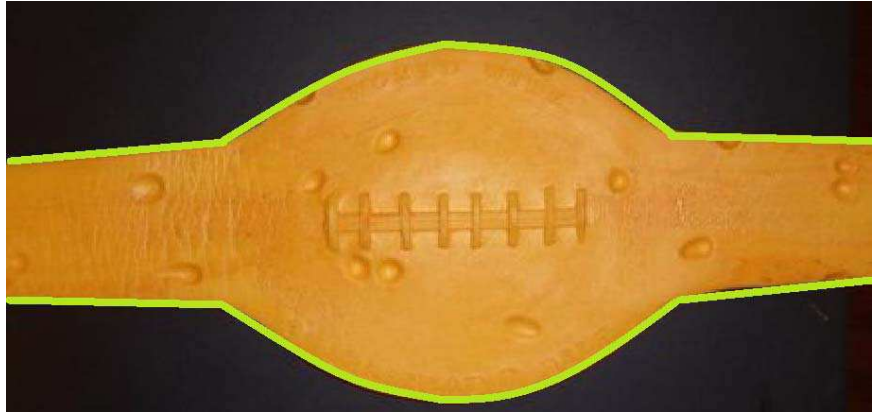
The Examining Attorney refused Applicant's mark on the ground it is a non-distinctive product design. Applicant doesn't deny that product designs must acquire distinctiveness to be registered on the Principal Register. Its dispute with the Examining Attorney concerns the nature of the mark Applicant is trying to protect. Applicant wants to register the unique combination of color and textured pattern on the surface of its variously configured products; specifically, "the color yellow/gold and a pattern of pock marks which are circular or oval-shaped depressions applied to the entire surface of the goods in a manner evoking the appearance of cheese." The USPTO has granted similar registrations for textured patterns on the surface of variously configured products. However, the Examining Attorney insists that Applicant's mark is not merely a surface feature, but a three-dimensional product configuration that incorporates the overall shape of Applicant's goods. The Examining Attorney is incorrect. Applicant asks the Board to resolve this issue. Only then can Applicant demonstrate the distinctiveness of its mark. Applicant hasn't been given the opportunity to do so because of the Examining Attorney's insistence that Applicant amend its mark from a surface color and texture combination to a three-dimensional product configuration.

I. Failure to Function Refusal

Applicant seeks to register a mark comprising “the color yellow/gold and a pattern of pock marks which are circular or oval-shaped depressions applied to the entire surface of the goods in a manner evoking the appearance of cheese” for a variety of goods: “foam coasters; insulating sleeve holders for beverage cans and bottles; foam storage baskets” in Class 21, “headwear; hats; ties; ear muffs; belts” in Class 25, and “Christmas tree ornaments; flying discs; toy bricks; balls for sports; footballs” in Class 28. The Examining Attorney insists that Applicant’s is trying to protect a product configuration, i.e., the overall shape of a product, and refused Applicant’s drawing and mark description on the ground they don’t match the configuration. She argues that it is the overall shape of Applicant’s goods, not the applied-for surface color and texture combination, that creates the appearance of cheese.

[T]he evidence of record along with applicant’s specimens and images of products (p.4) provided with the response clearly show that the goods are formed or molded from foam whereby air is inserted to create shapes of products that resemble cheese. These are not merely textures applied to goods and are not in any way analogous to the registrations relied upon. The images of applicant’s products clearly show that they have a 3 dimensional shape created from the contours created by the random holes in the foam. The unique shape of the resulting products forms the mark, not the material used.

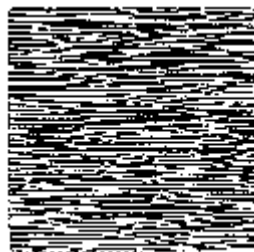
February 11, 2015 Office Action (“Feb. 2015 Action”), p. 3. Some of Applicant’s specimens are shown below. The green product outlines do not in any way resemble cheese.





It is not the three-dimensional configuration of Applicant's products that creates the mark. It is strictly the surface color and texture combination that creates the cheese appearance consumer recognize and that Applicant seeks to register.

The USPTO has registered the exact type of mark Applicant seeks to protect: textured patterns on the surface of variously configured products. For example, Louis Vuitton Malletier owns Registration No. 2263903 for "a distinctive man-made textured pattern utilized as a surface feature of applicant's variously configured products."



October 20, 2014 Office Action response ("Oct. 2014 Response"), Ex. A. Louis Vuitton's man-made textured pattern, like Applicant's mark, features both an "elevated portion" and "lower surface." *Id.* No claim is made to the broken lines in Louis Vuitton's drawing, meaning the registration covers the textured pattern independent of the shape of Louis Vuitton's products. *Id.*

Louis Vuitton also owns Registration Nos. 1931144, 2098630, and 2058732 for the same textured pattern in blue, black, and red. *Id.*

Louis Vuitton's registrations for what is known as "Epi leather" cover a variety of Class 18 goods. Registration No. 2263903 covers "suitcases, travelling bags, handbags, luggage, cosmetic cases sold empty, vanity cases sold empty, toiletry cases sold empty, shoulder bags, tote bags, leather shopping bags, briefcases, attache cases, briefcase-type portfolios, purses, change purses, wallets, key cases, document cases, business card cases and billfolds" in Class 18. The "Epi" products, like Applicant's products, come in a variety of shapes.





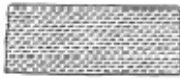
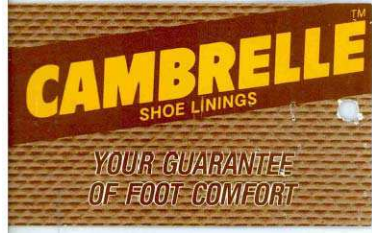
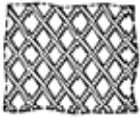

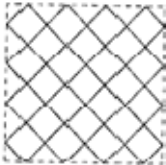

Oct. 2014 Response, Ex. B. The “Epi” pattern, like Applicant’s mark, is embedded in and part of the material that composes the products – leather in Louis Vuitton’s case, foam in Applicant’s case.





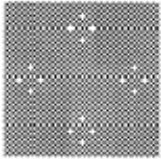
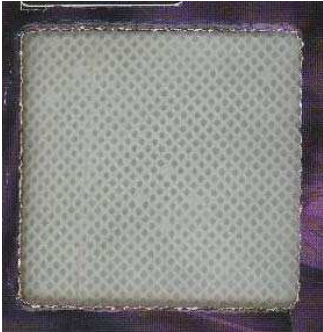


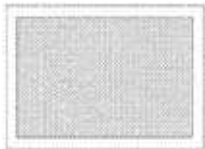







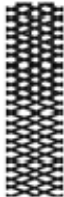



Thus, contrary to the Examining Attorney’s arguments, it does not matter that Applicant’s color and textured pattern combination is part of the foam material that composes Applicant’s goods, and it is not accurate to state that a three dimensional shape is “created from the contours created by the random holes in the foam” and that “[t]he unique shape of the resulting products forms the mark, not the material used.” Feb. 2015 Action, p. 3. The three dimensional shape is created by different molds used for the various products made by applicant, and those shapes or product configurations result in the utilitarian product sold by applicant – a hat, a football, a tie – all with a common pattern and color trade dress. That is what this applicant claims and seeks to register.

The USPTO has granted many other non-configuration registrations for textured patterns embedded in the materials that compose the goods.

No.	Drawing	Description	Goods	Specimen
1413427		The mark consists of a repeating raised pattern appearing on the surface of the fabric.	(Int'l Class: 24) Nylon fabric for use as shoe linings	 See also http://www.cambrelle.com/Pique/
1869234		The mark consists of raised ribs colored green forming a pattern of interlocking diamonds. The dotted lines in the drawing are not claimed as features of the mark. They are there to suggest the fact that the interlocking diamond pattern, color green, repeats itself continuously on the goods. The mark is lined for the color green.	(Int'l Class: 7) Vibration absorbing pads upon which industrial machinery is mounted	
2946953		The mark consists of a repeating diamond shaped pattern to be applied to the goods. The dotted lines indicate that the mark is a repeating pattern and are not a feature of the mark.	(Int'l Class: 20) Furniture, namely, outdoor furniture	

No.	Drawing	Description	Goods	Specimen
2988862		The mark consists of a design comprised of an interlocking spiral swirl pattern that is embossed on the goods. The stippling in the drawing is a part of the mark.	(Int'l Class: 16) Paper towels	
1323310		The mark consists of a continuous diamond pattern formed on the side of the goods.	(Int'l Class: 21) Glass jars	
1924891		The mark consists of a repeating pattern of small diamonds which are embossed on the surface of the goods. Interspersed with the small diamonds are larger diamond shapes which are arranged in a larger diamond pattern.	(Int'l Class: 24) Nonwoven fabric sold in the piece for use in the manufacture of car and boat covers, tarpaulins and tents	

No.	Drawing	Description	Goods	Specimen
4104123		<p>The mark consists of a three-dimensional configuration of the goods where the mark is a repeating pattern of embossed dots on the goods. The dashed lines and area between the dashed lines are merely to show placement of the mark on the goods and are not claimed as a feature of the mark.</p> <p>The stippling is a feature of the mark and does not indicate color.</p>	(Int'l Class: 10) Absorbent pads for medical or hygienic use, namely, absorbent surgical pads, absorbent wound care pads, absorbent incontinence bed pads, absorbent birthing pads, and absorbent operating room floor pads	
2528071		<p>The mark consists of a repeating generally triangular design that is used on the bottom of a shoe. The pattern is not limited to a particular portion of the bottom of a shoe and the dotted outline of a shoe is not a part of the mark; the dotted outline serves only to indicate that the mark is used on the bottom of a shoe.</p>	(Int'l Class: 25) Shoe parts, namely, outsoles	

No.	Drawing	Description	Goods	Specimen
3009490		The mark consists of a diamond design of seven graduated horizontal lines in a repetitive pattern.	(Int'l Class: 16) Plastic bags, namely, trash and garbage bags	 <p>See also http://www.glad.com/trash/kitchen/tall-kitchen-forceflex-drawstring-bags/ ("Glad® ForceFlex® bag's unique Diamond Texture stretches to prevent rips and tears")</p>
4341163		The mark consists of a repeating pattern of a stylized waffle design with the top portion resulting in 5 sided polygons in the center three vertical columns and six sided polygons on both sides, while the lower portions consists of 4 sided horizontal diamond like patterns.	(Int'l Class: 9) Protective covers and cases for cell phones, laptops and portable media players	
2236976		The mark consists of the configuration of a repeated pattern of raised rectangles as applied to the goods. The stippling in the drawing is a feature of the mark, and not intended to indicate color.	(Int'l Class: 10) Lining material for use with orthopedic casts	

Oct. 2014 Response, Ex. D. There is simply no basis for requiring that Applicant register its mark as a three-dimensional product configuration simply because its color and textured pattern combination is embedded in the material that composes the goods.

II. Other Refusals

The Examining Attorney also made final her requirements that Applicant amend its drawing to depict a product configuration, amend its mark description to describe a product configuration, and submit specimens of use that match the amended drawing and description. Since, for the reasons discussed above, the Examining Attorney's understanding of Applicant's mark is incorrect, these requirements must be withdrawn.

Applicant respectfully requests that the Board reverse the Examining Attorney's requirement that Applicant amend its drawing, mark description, and specimens to reflect a three-dimensional product configuration and her refusal to register on the ground Applicant hasn't proven the acquired distinctiveness of said configuration. Only when the Board resolves this issue and confirms that the applied-for design can function as a trademark can Applicant demonstrate its distinctiveness.

Respectfully submitted,

FOAMATION INC.

By its Attorneys,

Date: April 21, 2015

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CERTIFICATE OF TRANSMISSION

I hereby certify that on April 21, 2015, the foregoing Supplemental Appeal Brief was filed electronically with the Trademark Trial and Appeal Board.

/Laura M. Konkel/

Laura M. Konkel